IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.42 OF 1989 .

Gajanan Haribhau Kurhade : Appellant.

versus

Chintamani Gajanan Velkar : Respondent.

Mr.Rajesh Patil i/by Shri Kishore Dalal & Co. for the appellant.

Mr.P.D.Paul for the respondent.

CORAM : D.G.DESHPANDE,J.

DATED : 6th June 2005.

ORAL ORDER

1. Heard advocates for the appellant and respondent. This appeal is filed by the original defendant against the decree which was passed against him about removal of encroachment by the Bombay City Civil Court in Suit No.28 of 1967.

2. The plaintiff/respondent had filed a suit against the defendant/appellant for removal of encroachment. It was the case of the plaintiff that Plot No.16 of TPS Scheme II Borivali admeasuring 32’ x 26’ was let out to the original defendant in 1945. A rent note came to be executed. But the defendant made encroachment on the certain area on two occasions and took into his possession total area of 500 sq.yards. The plaintiff therefore filed the suit for removal of encroachment or for possession of encroached area.

3. In order to prove his contention, the plaintiff examined himself and PW.2 who was the agent or person looking after the property of the plaintiff. Both these witnesses consistently deposed about the case of the plaintiff. They also produced important documents like rent note or rent receipt. In the rent note or rent receipt there is a mention of the area let out to the defendant.

4. However, the case of the defendant was that his thumb impression was obtained on a blank

rent note. The rent note is of 1939 and, the original defendant putting forth his case of obtaining his thumb impression on a blank rent note cannot be accepted after 40 years when the evidence came to be recorded in 1987. Prior to that at no point of time the defendant had raised any objection about obtaining his thumb impression on blank rent note. He never protested for the rent note or rent receipt issued to him in which the area leased out was mentioned. The trial Court in this background decreed the suit and hence this appeal.

5. While counsel for the appellant was making submission it was pointed out to him that this defence was setting forth the case which was contrary to the document viz. Exhibit H Rent Note and, therefore, heavy burden lies upon him to firstly disprove the case of the plaintiff and to prove his case that the area of 500 sq.yards was let out to him in 1939. Another important aspect that goes against the defendant is that Gajanan Kurade (DW 1), who was the witness for the defendant, was brought on record after the death of original defendant Maruti Rama. In his deposition Gajanan Kurade has stated about the

state of affairs existing in 1950-51, because when his evidence was recorded in 1987 his age was 48 years. Admittedly, in 1950-51 he was 9 to 10 years of age. He has no personal knowledge of the contract between the plaintiff and the original defendant which took place in 1939 and he has admitted that in 1950-51 he was 10 years of age and, therefore, so far as agreement between the parties is concerned, he has no personal knowledge and he has also admitted that it was Maruti Ram who told him that he was in possession of 500 sq.yards. No other witness was examined by the defendant to prove that since inception of tenancy in 1939 they were tenants of 500 sq.yards area. Therefore, this is a case where the defendant i.e. D.W.1 is unable to disprove the case of the plaintiff or prove his case because he was not at all in picture in 1939 and he gets the knowledge of the facts in 1950-51 and his knowledge is based on information given to him by the original defendant.

6. Second thing that was rightly held against the appellant was that the documents of the plaintiff support the case of the plaintiff where as the defendant has no documents to show

that he was the tenant of 500 sq.yards of area. The trial Court has rightly appreciated the facts placed before it and accepted the case of the plaintiff. The judgment is sound. There is no perversity. The trial Court has properly appreciated the evidence. Therefore, there is no merit in this appeal. It is dismissed. However, in the circumstances, there will be no order as to cos. If the appellant has, in the mean time, deposited any mesne profit, as ordered by the Court, the respondent/landlord will be entitled to withdraw the same.

[D.G.DESHPANDE]

06/06/2005 JUDGE.